

Criminal Law

Would Louise's life have been safer in the hands of the English legal system?

by John Cooper

American Justice miscarried before millions of witnesses in Britain, America and across the globe when, on 30 October 1997, the jury in Cambridge, Massachusetts returned a guilty verdict on Louise Woodward. After three weeks of high drama, the final verdict rocked America and shocked Britain. More drama followed when one week later, Judge Zobel reduced the charge from second degree murder to involuntary manslaughter and sentenced Louise to 279 days, time served.

No-one can fault the speed with which the appeals have been heard. One week after the verdict, the first appeal had been heard and ruled upon. One month later, appeals from that ruling had been referred directly to the highest appeal court in the State and, on 6 March 1998, these appeals were due to be heard in full. But should it have ever come to this? Could it have happened here in England?

Three factors peculiar to the American system of justice; the media coverage, the lawyers' tactics and the judge's approach to the medical evidence; all mean that this miscarriage of justice could *not* have happened here.

THAT INTERVIEW

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MEDIA COVERAGE

First, live coverage of the trial meant that the media didn't have just a field day, they had a three-week circus. The jury were warned not to watch this media coverage but – unlike in the OJ Simpson trial – they were not sequestered to a hotel to protect them from it.

The most prejudicial example of this media coverage, was the interview with the parents of Matthew Eappen, on the day before the jury were to retire to consider their verdict. Mrs Eappen stated to all the world that Louise 'intentionally

killed Matthew' (a claim neither borne out by the evidence, nor expressly pursued by the prosecution in their closing speech). She went on:

'If Louise is found not to be responsible it doesn't take away the truth that we know. It takes away justice.'

Much play was made by the prosecution of the fact that both Mr and Mrs Eappen were doctors; they would have noticed had their child suffered a near mortal injury three weeks before, following rough play by his older brother. Mrs Eappen's words that night on the defence medical position were:

'It's totally ridiculous, there is no basis for that statement.'

Strong words delivered by a doctor condemning the defence medical evidence to the world; more importantly, strong words delivered on the day before the jury retired.

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When asked the next day if they had seen the interview, the jury denied seeing it. Unfortunately, the publicity and media coverage persisted for days as clips were repeatedly shown in the news; commentators gave their views of the interview and their views of other commentators' views. This continued well into the jury's deliberations. That kind of blanket coverage would have been hard to avoid by even the most dedicated and disciplined of jurors. Once heard, the emotional impact would have been incredible, and almost impossible to resist.

THE ENGLISH POSITION

In England trials are not allowed to be filmed and broadcast live. Under the *Contempt of Court Act 1981*, coverage is confined to contemporaneous reporting of events. The American media coverage, and this interview in particular, shows good reason why this is so.

Anyone would feel sympathy for a parent losing her child at such a tender age. Few people can truly understand what the Eappens felt during the trial without having been there themselves. But no-one can appreciate the impact of the media coverage upon the Eappens, especially when this coverage revealed that public opinion strongly favoured the acquittal of person they felt to be (and wanted to be) responsible.

This incredible level of pressure would never have been brought to bear upon the Eappens had the trial taken place here. Even if the Eappens had made their statements to the press at this juncture, their statements would have had less impact. This is because under reporting restrictions here (such as they are), their comments would be of similar significance to that of newspaper editorials or other media commentators and though damaging to the defence, they would not be as devastating as the Eappens' comments plainly have been.

If anything, what the media coverage of this trial really shows is that restrictions upon reporting of trials, even in this country, are not nearly tight enough. The kind of pressure and influence which was clearly manifest in this case on judge, jury, the Eappens and Louise, should never have been brought to bear and should never be allowed to influence the sanctity of the court room or a jury's deliberations.

LAWYERS TACTICS

The second, peculiarly American feature of this case, were the tactics of the defence lawyers, particularly the 'noose or loose' tactic which so spectacularly backfired. This tactic would not, and could not, be used under this jurisdiction.

During her testimony, on the advice of her lawyers, Louise asked Judge Zobel for the jury to be given the choice of convicting her of murder or acquitting her completely, thereby removing from the jury the possibility of finding her guilty of a lesser offence. This dangerous gamble was an attempt to force an

acquittal. The prosecution recognised that at that stage, a conviction for murder was unlikely and duly objected; however the judge, in accordance with his practice, allowed the application.

After verdict jurors reported that they had been put into a straight-jacket by this decision. Some felt Louise had acted culpably, but were reluctant to convict her of such a serious offence on the evidence they had heard. Many reported being relieved when the judge withdrew the verdict on the charge of murder and replaced it with involuntary manslaughter.

VIEW FROM THE US

A view of the Louise Woodward trial from the US perspective can be found at p. 19 of Issue 3 of *Amicus Curiae*

THE ENGLISH POSITION

This was an application which could never be made and, if made, would never be acceded to in an English court. A jury would never be presented with an indictment which was not borne out by the facts of the case. The prosecution, in conjunction with the defence, decide on the indictment to go to the jury. If the evidence in a case does not support one charge, and a lesser charge is appropriate, then the lesser charge is left to the jury.

The reason for this eminently sensible approach is that the 'noose or loose' approach pursued by the American lawyers in this case, forces juries to choose between the spirit of the law and the letter of it, when the two should always go hand in hand. In this instance, the jury chose the spirit of the law and convicted a defendant of a crime which, in essence, they were not sure she had committed.

Whilst the ultimate choice of such drastic tactics is always with the client (even in America) it is a brave client that would go against the advice of her lawyers in such a situation. The pressure being enormous, the stakes being high, clients are faced, in reality, with little choice but to do as advised. This is particularly so where, as in the case of Louise, the client is still a teenager. Put simply it was a dangerous gamble that would not and could not have been pursued here.

MEDICAL EVIDENCE

Thirdly, the medical evidence, so hotly contested during trial, was mishandled by Judge Zobel in two ways, which would

not happen in England.

The defence team had repeatedly asked the prosecution for copies of, or access to, the photographs of Matthew Eappen's head after being admitted to hospital. The defence claimed that these showed that the skull fracture Louise was accused of causing on 4 February 1997 was an old wound; it had already begun to heal and the bones had begun to knit. This, the defence argued, combined with the clear serum found on examination of the haemorrhage, proved the age of this wound and the innocence of Louise.

Despite repeated requests for these photographs for months before the trial, and for three weeks during the trial, it was only on the last day of the trial that they were found. Worse, they were found in the evidence room where the evidence for this case had been kept: in short, exactly where they were supposed to be and where the prosecution should have been able to find them long before. By the time the photos were found, not only had the prosecution closed their case, the defence had also closed theirs. All that remained were the closing speeches.

The defence sought time for their experts to consider the photographs and testify upon them for the benefit of the jury. The judge wrongly refused this motion despite the photographs going to the heart of the defence case and being so crucial to the jury's imminent deliberations.

In England, the late production of the photographs, so central to the defence case, after repeated requests for them before and during the trial, would have provided strong grounds for a short adjournment for the examination of the evidence and recall of the expert witnesses to briefly deal with them particularly if, as in this case, the experts were readily available to do so.

Further damage was done to the defence case when Judge Zobel refused to allow the jury to hear a transcript of the defence medical evidence when they requested to do so during their deliberations; a not unreasonable request,

as the prosecution medical evidence transcript had already been read to the jury.

The jury, aware of the unbalanced view they were receiving, sent a *second* note to the judge, emphasising how crucial this evidence was to their deliberations. Judge Zobel again refused the request. He did so on the basis that the prosecution transcript was already prepared (pursuant to an earlier defence request), but a transcript of the defence medical evidence transcript was not; to prepare one would hold up the jury deliberations for too long.

Jurors have since reported that whilst they were initially equally split as to acquittal or conviction, by this stage, the divisions were four for acquittal, four for guilty, with four not sure either way. Hours later a verdict of guilty was reached and justice miscarried.

In England, the jury would have been reminded of the evidence from the judge's note, which would have been checked with the notes of counsel for both the prosecution and defence. It is likely the jury would have been reminded of the expert evidence for both sides, whichever expert they asked for, to prevent undue weight being given to one side's evidence by its repetition. Certainly a jury would never be denied access to one side's evidence having been granted access to that of the other.

CONCLUSION

In conclusion, despite all its proud claims to being the land of truth and justice, the three central elements of this trial which make this case so unfortunate are uniquely American, making this a uniquely American miscarriage of justice; only in the USA could this ever have come to pass. ㊦

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on the internet

http://headlines.yahoo.com/Full_Coverage/US/Louise_Woodward_Case

Provides a useful starting point for a wide variety of material relating to the Louise Woodward case.